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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)	Criminal No. 08CR1728-IEG
)	
11 Plaintiff,	)	DATE: July 7, 2008
	)	TIME: 2:00 p.m.
12 v.)	
	)	GOVERNMENT'S RESPONSE AND
13 JESUS MANUEL PEREZ (1),	)	OPPOSITION TO DEFENDANT'S
	)	MOTIONS TO:
14 Defendant.)	
	)	(1) COMPEL FURTHER DISCOVERY
15	)	AND PRESERVE EVIDENCE;
	)	(2) FILE FURTHER MOTIONS
16)	
	)	TOGETHER WITH STATEMENT OF FACTS,
17	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES, AND GOVERNMENT'S
18	)	MOTION FOR RECIPROCAL DISCOVERY

19 COMES NOW, the plaintiff, UNITED STATES OF AMERICA, by and
20 through its counsel, KAREN P. HEWITT, United States Attorney, and Anne
21 Kristina Perry, Assistant United States Attorney and hereby files its
22 response and opposition to defendant' above-referenced motions. This
23 response and opposition is based upon the files and records of the
24 case, together with the attached statement of facts and memorandum of
25 points and authorities. The Government also hereby files its motion
26 for reciprocal discovery.
27
28

I.

STATEMENT OF THE CASE

On May 28, 2008, a Federal Grand Jury seated in San Diego, California, returned a two-count indictment charging the defendant with importation of cocaine, in violation of Title 21, United States Code, Sections 952 and 960 and possession of cocaine with intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1). The Defendant is presently in custody. On June 23, 2008, Defendant filed the above captioned motions. The United States files the following response.

II.

STATEMENT OF FACTS

On May 14, 2008, at approximately 10:20 a.m., Defendants Jesus Manuel Perez and Jose Gonzalez-Perales entered the United States at the Calexico, California, West Port of Entry. Perez was driving a brown 2000 Chrysler Sebring, and Perales was a passenger in the vehicle. The vehicle was registered in Perez' name, and bore California license plate 6AMX949. At the primary inspection area, the Defendants gave Customs and Border Protection Officer (CBPO) J. Stensgard negative customs declarations. The vehicle was selected for secondary inspection by an automated targeting system, and Perez appeared nervous when CBPO Stensgard told him that the vehicle was being referred to secondary.

At secondary inspection, Perez told CBPO L. Garcia that he owned the vehicle, and that he and Gonzalez were traveling to Calexico to go shopping. CBPO Garcia requested that the two Defendants exit the vehicle, and asked CBPO S. Barela to conduct an inspection of the Sebring using his Narcotics Detector Dog, "Astrix." During the

1 inspection, CBPO Garcia noted that both defendants acted nervous and
2 that their hands were shaking. Astrix entered the vehicle and alerted
3 to the backseat rest portion of the vehicle's interior. The
4 Defendants were immediately handcuffed. Further inspection of the
5 vehicle by CBPO Garcia revealed 20 packages concealed in a non-factory
6 compartment behind the backseat. The packages were wrapped in clear
7 cellophane with tan-colored packing tape. A probe of the packages
8 produced a white powdery substance, which field-tested positive for
9 cocaine. The 20 packages had a combined net weight of approximately
10 22.60 kilograms (49.72 pounds).

11 Perez and Gonzalez were each placed under arrest and each were
12 separately advised of their Miranda Rights. During each interview,
13 both Perez and Gonzalez acknowledged their rights, waived their
14 rights, and agreed to answer questions. During the Perez interview,
15 Perez stated to Immigration and Customs Enforcement Agent Dotson that
16 he thought that the vehicle contained 20 kilograms of marijuana.
17 Perez stated that he was to be paid \$1,500.00 to take the vehicle to
18 the "hotel near the carwash" in Calexico, Ca. Perez and Gonzalez are
19 friends and they spend time together. Perez stated that Gonzalez
20 called him the day before to arrange a ride to Gonzalez' Probation
21 Officer's house in El Centro, Ca. Perez picked Gonzalez up from
22 Gonzalez' girlfriend's house on the morning of May 14, 2008.

23 During the Gonzalez interview, Gonzalez denied knowledge of any
24 illegal substance in the vehicle. He stated that he had never seen
25 the vehicle before May 14, 2008. Gonzalez stated that he and Perez
26 are roommates and that they don't see each other very much. He
27 claimed that they happened to meet each other as Gonzalez was going
28

1 to the bus station in order to see his Probation Officer, and that
2 Perez offered Gonzalez a ride instead.

3 III.

4 POINTS AND AUTHORITIES

5 A. DEFENDANT'S DISCOVERY MOTION

6 The Defendant has received 125 pages of discovery in this case.
7 The following responds to the defendant's specific requests:

8 1. The Defendant's Statements

9 The Government has produced arrest reports disclosing the
10 substance of all oral and written statements of the Defendants. The
11 Government will continue to produce discovery related to Defendants'
12 statements made in response to questions by Government agents. The
13 Government notes that Defendants were advised of their Miranda rights,
14 and Defendants subsequently waived those rights. The Government has
15 already turned over the law enforcement reports containing the
16 substance of Defendants' pre-and post-arrest statements.

17 2. Arrest Reports, Notes and Dispatch Tapes

18 The Government has provided the Defendant with arrest reports.
19 Relevant oral statements of Defendant are included in the reports
20 already provided. Agent rough notes, if any exist, will be preserved,
21 but they will not be produced as part of Rule 16 discovery.

22 A defendant is not entitled to rough notes because they are not
23 "statements" within the meaning of the Jencks Act unless they
24 compromise both a substantially verbatim narrative of a witness'
25 assertions and they have been approved or adopted by the witness.
26 United States v. Bobadilla-Lopez, 954 F.2d 519 (9th Cir. 1992); United
27 States v. Spencer, 618 F.2d 605 (9th Cir. 1980); see also United
28 States v. Griffin, 659 F.2d 932 (9th Cir. 1981).

1 3. Brady Material

2 The Government will comply with its obligation under Brady v.
3 Maryland, 373 U.S. 83 (1963).

4 4. Any Information That May Result in a Lower Sentence Under
5 The Guidelines

6 The Government will comply with its obligation under Brady v.
7 Maryland, 373 U.S. 83 (1963).

8 5. The Defendant's Prior Record

9 It is not believed that the Defendant has a prior criminal
10 history. If one exists, it will be provided as part of discovery.

11 6. 404(b) Evidence

12 The Government will provide the defendant with notice and any
13 404(b) evidence.

14 7. Evidence Seized

15 The Government will preserve all evidence to which defendant is
16 entitled to pursuant to the relevant discovery rules.

17 8. Preservation of Evidence

18 The Government will preserve all evidence to which defendant is
19 entitled pursuant to the relevant discovery rules.

20 9. Henthorn Materials

21 The United States has complied and will continue to comply with
22 United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) by requesting
23 that all federal agencies involved in the criminal investigation and
24 prosecution review the personnel files of the federal law enforcement
25 inspectors, officers, and special agents whom the United States
26 intends to call at trial and disclose information favorable to the
27 defense that meets the appropriate standard of materiality. See
28 United States v. Booth, 309 F.3d 566, 574 (9th Cir. 2002) (citing
United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992)). If

1 the materiality of incriminating information in the personnel files
2 is in doubt, the information will be submitted to the Court for an in
3 camera inspection and review.

4 Defendant's request that the specific prosecutor in this case
5 review the personnel files is unwarranted and unnecessary. Henthorn
6 expressly provides that it is the "government," not the prosecutor,
7 which must review the personnel files. Henthorn, 931 F.2d at 30- 31.
8 Accordingly, the United States will utilize its typical practice for
9 review of these files, which involves requesting designated
10 representatives of the relevant agencies to conduct the reviews. The
11 United States opposes the request for an order that the prosecutor
12 personally review the personnel files.

13 10. Tangible Objects

14 The Government will provide copies of and/or an opportunity to
15 inspect all documents and tangible things material to the defense,
16 intended for use in the Government's case in chief, or seized from
17 Defendant.

18 The Government will try to preserve all evidence to which
19 Defendant is entitled, but objects to any global request for
20 preservation of all evidence as contrary to Arizona v. Youngblood, 488
21 U.S. 51, 57 (1988) (improper and unwise to impose on the government
22 "an undifferentiated and absolute duty to retain and to preserve all
23 material that might be of conceivable evidentiary significance in a
24 particular prosecution"). As to any seized contraband, Defendant is
25 placed on notice that secured storage limitations generally require
26 that all but the test sample of contraband be destroyed 60 days after
27 seizure.

11. Expert Witness

The Government will comply with its obligation under F.C.R.P. 16(a)(1)(D).

12. Impeachment Evidence

The Government will comply with its obligations to disclose impeachment evidence under Giglio v. United States, 405 U.S. 150 (1972). The Government will also provide the criminal history and prior material acts of misconduct, if any, of its trial witnesses as mandated in Giglio. In addition, the Government will disclose all impeachment material, if any, when it files its trial memorandum, although it is not required to produce such material until after its witnesses have testified at trial. United States v. Bramble, 103 F.3d 1475 (9th Cir.1996).

13. Evidence of Criminal Investigation of Any Government Witness

The Government will comply with its obligations to disclose impeachment evidence under Giglio v. United States, 405 U.S. 150 (1972).

14. Evidence of Bias

The Government also agrees to provide information related to the bias, prejudice or other motivation of Government trial witnesses as required in Napue v. Illinois, 360 U.S. 264 (1959).

15. Evidence Affecting Perception and Recollection

The Government will provide the defendant with evidence pertaining to potential impairment of any witness's ability to perceive, remember, communicate, or tell the truth as the existence of such evidence is made known and available.

1 16. List and Addresses of Witnesses

2 The Government will provide defendant with a list of all
3 witnesses which it intends to call in its case-in-chief at the time
4 the Government's trial memorandum is filed, although delivery of such
5 list is not required. See United States v. Dischner, 960 F.2d 870
6 (9th Cir.1992); United States v. Culter, 806 F.2d 933, 936 (9th
7 Cir.1986); United States v. Mills, 810 F.2d 907, 910 (9th Cir.1987).
8 Defendant, however, is not entitled to the production of addresses or
9 phone numbers of possible Government witnesses. See United States
10 v.Hicks, 103 F.3d 837, 841 (9th Cir.1996); United States v. Thompson,
11 493 F.2d 305, 309 (9th Cir.1977), cert. denied, 419 U.S. 834 (1974).
12 The defendant has already received access to the names of potential
13 witnesses in this case in the investigative reports previously
14 provided to him.

15 17. Names of Witnesses Favorable to Defendant

16 The Government is not aware of any witness who made a favorable
17 statement concerning defendant. The Government will provide defendant
18 the name of any such witness should it become known.

19 18. Statements Relevant to the Defense

20 The Government will perform its duty under Brady v. Maryland, 373
21 U.S. 83 (1963).

22 19. Jencks Act Material

23 The Government will comply with its obligation pursuant to the
24 Jencks Act.

25 20. Giglio Information

26 The Government will comply with its obligations to disclose
27 impeachment evidence under Giglio v. United States, 405 U.S. 150
28 (1972).

1 21. Agreements Between the Government and Witnesses

2 To date there are no agreements between the Government and any
3 of its witnesses.

4 22. Informants and Cooperating Witnesses

5 To date there are no agreements between the Government and any
6 of its witnesses.

7 23. Bias by Informants or Cooperating Witnesses

8 The Government will comply with Giglio v. United States, 405 U.S.
9 150 (1972). It must be noted that this case is a "border bust" which
10 did not utilize the services of informants.

11 24. Personnel Records of Government Officers Involved in Arrest

12 The United States has complied and will continue to comply with
13 United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) by requesting
14 that all federal agencies involved in the criminal investigation and
15 prosecution review the personnel files of the federal law enforcement
16 inspectors, officers, and special agents whom the United States
17 intends to call at trial and disclose information favorable to the
18 defense that meets the appropriate standard of materiality. See
19 United States v. Booth, 309 F.3d 566, 574 (9th Cir. 2002) (citing
20 United States v. Jennings, 960 F.2d 1488, 1489 (9th Cir. 1992)). If
21 the materiality of incriminating information in the personnel files
22 is in doubt, the information will be submitted to the Court for an in
23 camera inspection and review.

24 25. Training of Relevant Law Enforcement Officers

25 The Government will comply with its obligations under Brady.

26 26. Performance Goals and Policy Awards

27 Absent some indication that the defendants' arrests were somehow
28 related to an arrest quota, this is a wholly irrelevant request, not

1 required under Brady or by Rule 16 of the Federal Rules of Criminal
2 Procedure.

3 27. Opportunity to Weigh, View, and Photograph Contraband

4 As stated previously, the United States has, and will continue
5 to comply with Fed. R. Crim. P. 16(a)(1)(C) in allowing Defendant an
6 opportunity, upon reasonable notice, to examine, copy and inspect
7 physical evidence which is within the possession, custody or control
8 of the United States, and which is material to the preparation of
9 Defendant's defense or is intended for use by the United States as
10 evidence in chief at trial, or were obtained from or belong to
11 Defendant. To this end, the United States has requested that the
12 drugs in this case be preserved pending order of the Court or
13 resolution of this case, whichever is soonest.

14 28. DEA-7 Form

15 The United States will provide Defendant with the results of the
16 Drug Enforcement Administration laboratory tests on the marijuana
17 seized in this case pursuant to Fed. R. Crim. P. 16(F).

18 29. TECS Reports

19 The United States objects to providing Defendant with complete
20 vehicle and pedestrian crossing reports from the Treasury Enforcement
21 Communications System ("TECS"). TECS reports are not subject to Fed.
22 R. Crim. P. 16(c) because the reports are neither material to the
23 preparation of the defense, nor intended for use by the United States
24 as evidence during its case-in-chief. The TECS reports are not Brady
25 material because the TECS reports do not present any material
26 exculpatory information or any evidence favorable to Defendant that
27 is material to guilt or punishment. If the United States intends to
28 introduce TECS information at trial, discovery of the relevant TECS

1 reports will be made at least by the time of the filing of its trial
2 memorandum.

3 30. Scientific and Other Information

4 The United States will provide Defendant with any scientific
5 tests or examinations, in accordance with Fed. R. Crim. P.
6 16(a)(1)(F).

7 31. Narcotics Detector Dog Information

8 The United States strongly objects to providing Defendant with
9 Narcotic Detector Dog information. Defendant cites no legal ground
10 for this request. The interior and exterior of Defendant's vehicle
11 was sniffed in the secondary inspection area at the border, where no
12 probable cause or even a reasonable articulable suspicion is needed
13 to conduct a routine search. United States v. Montoya de Hernandez,
14 473 U.S. 531, 538 (1985); United States v. Vargas-Castillo, 329 F3d
15 715, 722 (9th Cir. 2003). Thus, none of the information Defendant
16 requests is relevant or discoverable.

17 32. Residual Request

18 The Government will comply will all rules of discovery.

19 **B. MOTION FOR LEAVE TO FILE FURTHER MOTIONS**

20 Defendant moves for leave to file "further motions." The
21 Government has no opposition to this request given that reports are
22 pending.

23 **IV.**

24 **THE GOVERNMENT'S MOTION FOR RECIPROCAL
DISCOVERY SHOULD BE GRANTED**

25 The Government moves for all discovery to which it is entitled
26 under Fed. R. Crim. P. 16(b) and 26.2.

1 v.

2 CONCLUSION

3 For the above stated reasons, the Government respectfully
4 requests that the Defendant's motions be denied, except where
5 unopposed, and the Government's motion for reciprocal discovery be
6 granted.

7 DATED: June 30, 2008.

8 Respectfully submitted,

9 KAREN P. HEWITT
10 United States Attorney

11 s/Anne Kristina Perry
12 ANNE KRISTINA PERRY
Assistant U.S. Attorney
anne.perry2@usdoj.gov

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 08CR1728IEG

Plaintiff,)

v.)

JESUS MANUEL PEREZ (1),)

Defendant.)

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, ANNE KRISTINA PERRY, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Response and Opposition to Defendant's Motions on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Elizabeth Barros, Esq.

Email: elizabeth_barros@fd.org

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 30, 2008.

s/Anne Kristina Perry

ANNE KRISTINA PERRY